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THE HONORABLE MARY K. DIMKE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

ROBERT THEODORE
KINNUNE,

Plaintiff,

vs.

STATE OF WASHINGTON,
WASHINGTON STATE
DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Defendants.

NO. 2:23-cv-00026-MKD

DEFENDANTS'
STATEMENT OF
MATERIAL FACTS NOT IN
DISPUTE TO PLAINTIFF'S
PARTIAL SUMMARY
JUDGMENT

Pursuant to L. Civ. R. 56(c)(1), DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE TO PLAINTIFF'S PARTIAL SUMMARY JUDGMENT, Defendants provide the following statement of material facts not in dispute.

1. Not in dispute.
2. Not in dispute.
3. Not in dispute.
4. Partially disputed. Prior to active duty, Kinnune had his own office.

DEFENDANTS' STATEMENT
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ECF No 38-1, ¶ 4. When Kinnune returned in September 2020, he was assigned to share an office with April Ross, but at Kinnune's request, ESH moved him to a different office. ECF No 46-2 (Kinnune Dep. 57:3-6).

5. Not in dispute.

6. Not in dispute.

7. Not in dispute.

8. Not in dispute.

9. Not in dispute.

10. Not in dispute.

11. Objection, relevance. This fact is immaterial. For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Kinnune being mentioned in a ESH Newsletter is irrelevant to whether the protections of USERRA applies, whether he was correctly reemployed under USERRA, and it is not an event relating to discrimination or retaliation based upon his military status.

12. Not in dispute.

13. Prior to his military leave in 2018, Kinnune was the chair of the Ethics Committee. ECF 39-1 Ex 1 (Frost Dep. 197:2-5).

14. Not in dispute.

15. Not in dispute.

1 16. Not in dispute.

2 17. Not in dispute.

3 18. Not in dispute.

4 19. Not in dispute.

5 20. Objection, relevance. This fact is immaterial. For purposes of summary
6 judgment, a fact is “material” if it might affect the outcome of the suit
7 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
8 248 (1986). Kinnune using vacation time, on his own accord, prior to
9 military service is irrelevant to his relief sought in his Motion for Partial
10 Summary Judgment.

11 21. Not in dispute.

12 22. Not in dispute.

13 23. Not in dispute.

14 24. Not in dispute.

15 25. ESH hired April Ross, in a non-permanent position and at the
16 recommendation of Robert Kinnune, to be the interim Chaplain/Religious
17 Coordinator while Kinnune was on military service leave. ECF No 46-2
18 Ex N (Kinnune Dep 44:7-13); ECF No 45 Ex C.

19 26. Not in dispute.

20 27. Not in dispute.

21 28. Not in dispute.

22
DEFENDANTS’ STATEMENT
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29. This testimony quotes a written statement from April Ross. ECF No 39-1 Ex 5 (Ross Dep. 153:8-15). The full statement from the exhibit reads: “Joey Frost called me (April Ross) in for a meeting in September 2018 due to Robert’s contact with her about my actions and his perceptions that I was not performing well as Chaplain.” ECF No 39-2 Ex 22, p 6. Frost was not worried about this allegation as she was observing Ross do a good job and had not received any complaints about Ross. Second Decl. Hennessey Ex V (Frost Dep. 99:5-2).

30. Disputed. This statement mischaracterizes Frost’s testimony. Frost’s testimony about when she asked Ross to prepare a written summary of her issues with Kinnune is uncertain; it was sometime after September 2018. ECF No 39-1 Ex 1 (Frost Dep. 101:2-9).

31. Not in dispute.

32. Not in dispute.

33. Not in dispute.

34. Not in dispute.

35. Objection, calls for a legal conclusion and is therefore not a material fact. *Robertson v. Dorn*, No. 2:21-CV-64-RMP, 2021 WL 3475558, at *3 (E.D. Wash. Aug. 6, 2021) (The Court disregards evidence that is a “legal conclusion improperly presented in the guise of factual statements, in

determining whether summary judgment is appropriate.”). Whether an ESH employee’s actions violate a criminal statute is a legal conclusion.

36. Objection, relevance as this fact is immaterial. For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). ESH’s training to its employee’s about being “mandatory reporters” is irrelevant to his relief sought in his Motion for Partial Summary Judgment.

37. Objection, relevance as this fact is immaterial. For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts relating to when ESH employees have to report allegations of an employee “fondling the breasts of a patient” is irrelevant to his relief sought in his Motion for Partial Summary Judgment.

38. Objection, relevance as this fact is immaterial and is a legal conclusion. For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Robertson v. Dorn*, No. 2:21-CV-64-RMP, 2021 WL 3475558, at *3 (E.D. Wash. Aug. 6, 2021) (The Court disregards evidence that is a “legal conclusion improperly presented in the guise of factual statements, in determining whether summary judgment is

appropriate.”). The reporting of an ESH employee having sexual intercourse with a patient is irrelevant to his relief sought in his Motion for Partial Summary Judgment. Further, whether a specific factual scenario must be reported to law enforcement “under the mandatory report laws” is a legal conclusion.

39. Objection, relevance as this fact is immaterial. For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether anyone from ESH reported Kinnune to law enforcement is irrelevant to his relief sought in his Motion for Partial Summary Judgment. Defendants do not dispute that the record does not contain a report to law enforcement of any of the allegations made by Ross in January 2019.

40. Not in dispute.

41. Not in dispute.

42. Objection, relevance as this fact is immaterial. For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether Ross’ January 2019 six page complaint contains violations of Policy No. 18.66 by Kinnune is irrelevant to his relief sought in his Motion for Partial Summary Judgment.

1 43. Objection, relevance as this fact is immaterial. For purposes of summary
 2 judgment, a fact is “material” if it might affect the outcome of the suit
 3 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 4 248 (1986). Whether an employee who is alleged to have violated a policy
 5 has a right to receive notice and an opportunity to speak in his own defense
 6 is irrelevant to his relief sought in his Motion for Partial Summary
 7 Judgment.

8 44. Not in dispute.

9 45. Not in dispute.

10 46. Not in dispute.

11 47. Not in dispute.

12 48. Defendants do not dispute Hill’s recollection of Frost or Ross’ statements.
 13 However, Hill doesn’t recall if any of the statements were related to
 14 Kinnune’s military status. Second Decl. Hennessey Ex W (Hill Dep.
 15 45:21-46:1).

16 49. Objection, relevance as this fact is immaterial. For purposes of summary
 17 judgment, a fact is “material” if it might affect the outcome of the suit
 18 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 19 248 (1986). Any instruction from Frost to Hill to not talk to Kinnune is
 20 irrelevant to his relief sought in his Motion for Partial Summary Judgment.

21 50. Not in dispute.

1 51. Not in dispute.

2 52. Not in dispute. Second Decl. Hennessey Ex T.

3 53. Defendants agree that one metric ESH used to justify an increase in
4 positions was data. However, a lack of data doesn't necessarily preclude
5 additional positions. Under the Collective Bargaining Agreement, ESH has
6 the power to determine the organizational structure and the budget and size
7 of the agency's workforce. ECF No 45-7, p 55.

8 54. Not in dispute.

9 55. Not in dispute.

10 56. Not in dispute.

11 57. Objection, relevance and confusion. Western State Hospital (WSH) is an
12 unnamed party to this lawsuit. WSH has different staff, patients, and
13 policies which makes and comparison likely to confuse a finder of fact.
14 Further, there is no evidence about the hiring practices of WSH compared
15 to ESH and any executive decision about how to spend resources related
16 to staffing.

17 58. Not in dispute.

18 59. Disputed. Carlson did send paperwork to Class and Compensation
19 department seeking approval to establish a new full-time Religious
20 Coordinator position, but it did not cover Kinnune's position. ECF No 39-
21
22

2 Ex 13; Ex 29. Kinnune's position was EW62E and this new position would be below Kinnune on the organizational chart. *Id.*

60. Disputed. Carlson did send paperwork to Class and Compensation department seeking approval to establish a new full-time Religious Coordinator position, but it did not cover Kinnune's position. ECF No 39-2 Ex 13; Ex 29. Kinnune's position was EW62E and this new position was without a position number but would be below Kinnune on the organizational chart. *Id.*

61. Disputed. This was a new position that did not have a prior level of supervision. ECF No 39-2 Ex 29. Therefore, there was no change in the level of supervision.

62. Partially disputed. Carlson and Frost did receive an email on May 21, 2020 from Class and Compensation advising them of the Governor's May 18, 2020 hiring freeze, the new Religious Coordinator position would need to have an exemption to said hiring freeze in order to be processed. ECF No 39-2 Ex 30.

63. Disputed. The evidence offered by Kinnune does not support this proposition. Exhibit 30 does not state that the second Religious Coordinator Position was not approved. ECF No 39-2 Ex 30. Exhibit 49 appears to be Covid-19 screening logs and also does not state that the second Religious Coordinator Position was not approved. Finally,

Kenney's testimony is misquoted. Kenney agreed that between June 15 and December 11, 2020, the second Religious Coordinator position had not been approved. ECF No 39-2 Ex 10 (Kenney Dep. 28:23-29:3). The second Religious Coordinator position was eventually approved by at least May 26, 2021. ECF No 45-4, p 21 (April Ross appointment letter as a Religious Coordinator in position AS92-E).

64. Not in dispute.

65. Objection, relevance as this fact is immaterial. For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts of Hill's employment is irrelevant to Kinnune's relief sought in his Motion for Partial Summary Judgment.

66. Objection, relevance as this fact is immaterial. For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts of Hill's employment is irrelevant to Kinnune's relief sought in his Motion for Partial Summary Judgment.

67. Objection, relevance as this fact is immaterial. For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986). The facts of Hill's employment is irrelevant to Kinnune's relief sought in his Motion for Partial Summary Judgment.

68. Not in dispute.

69. Not in dispute.

70. Disputed. At the time of reconstitution Ross was appointed to be the leader of the CISM Team. ECF 38-1 ¶ 70. Once Kinnune returned from military leave, "Coordinating CISM responses will be under the direction of the Director of Organizational Development [Frost] in collaboration with the Religious Coordinator and will rotate." ECF No 45-8, p 75.

71. Not in dispute.

72. Not in dispute.

73. Not in dispute.

74. Not in dispute.

75. Not in dispute.

76. Not in dispute.

77. Not in dispute.

78. Not in dispute.

79. Not in dispute.

80. Not in dispute.

81. Not in dispute.

82. Not in dispute.

1 83. Not in dispute.

2 84. Not in dispute.

3 85. Objection, relevance as this fact is immaterial. For purposes of summary
4 judgment, a fact is “material” if it might affect the outcome of the suit
5 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
6 248 (1986). Kinnune’s knowledge of any July 2020 meetings is irrelevant
7 to his relief sought in his Motion for Partial Summary Judgment.

8 86. Not in dispute.

9 87. Objection, relevance as this fact is immaterial. For purposes of summary
10 judgment, a fact is “material” if it might affect the outcome of the suit
11 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
12 248 (1986). The time and date ESH staff were editing a document is
13 irrelevant to Kinnune’s relief sought in his Motion for Partial Summary
14 Judgment.

15 88. Disputed. Frost did not testify that Kinnune and Ross would share duties.
16 Ross testified that “[t]here would be two Religious coordinators full-time
17 going forward.” ECF No 39-1 Ex 1 (Frost Dep. 125:19-23).

18 89. Disputed. The updated position description form that Kinnune signed is
19 not a part of the record. See ¶ 60. Frost did provide Kinnune with the
20 Spiritual Care Services Work Instructions/Expectations and had him sign
21 indicating that he acknowledge receipt. ECF No 45-9, p 80.

1 90. Not in dispute.

2 91. Disputed. See ¶ 60, 61. Additionally, the Collective Bargaining Agreement
3 allows for a supervisor to determine the level of supervision. ECF No 45-
4 7, p 55 (Management reserves the right to “Direct and supervise
5 employees”).

6 92. Not in dispute.

7 93. Not in dispute. Kinnune’s first day back at ESH was August 31, 2020. ECF
8 39-3 Ex 41, p 393.

9 94. Not in dispute.

10 95. Not in dispute.

11 96. Objection, calls for a legal conclusion and invades the province of the jury.
12 Lay witnesses may give an opinion on an ultimate issue to be decided by
13 the trier of fact, but they may not offer legal conclusions. *Ward v. Crow*
14 *Vote LLC*, 634 F. Supp. 3d 800, 810 (C.D. Cal. 2022). But lay opinion
15 witnesses “may not testify based on speculation, rely on hearsay or
16 interpret unambiguous, clear statements.” *Id.* “Although a lay witness may
17 give an opinion on an ultimate issue to be decided by the trier of fact, Fed.
18 R. Evid. 704(a), she may not offer legal conclusions.” *Id.* Here the
19 testimony quoted is interpreting documents shown to the witness, not
20 relying on her personal knowledge of any fact. Further, the quote is a legal
21 conclusion.

- 1 97. Not in dispute.
- 2 98. Not in dispute.
- 3 99. Not in dispute.
- 4 100. Disputed. Kinnune concedes that it is disputed whether Frost made it clear
5 that she would escort him to the new office space. ECF No 39-3 Ex 45.
- 6 101. Not in dispute.
- 7 102. Not in dispute.
- 8 103. Not in dispute.
- 9 104. Disputed. There is no record that Kinnune received any of the criticisms
10 listed in Defendant's Interrogatory 5 "in the days after he returned from
11 military service leave."
- 12 105. Not in dispute.
- 13 106. Not in dispute.
- 14 107. Objection, relevance as this fact is immaterial. For purposes of summary
15 judgment, a fact is "material" if it might affect the outcome of the suit
16 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
17 248 (1986). The amount of shifts assigned to Kinnune for Covid-19
18 screening is irrelevant to his relief sought in his Motion for Partial
19 Summary Judgment.
- 20 108. Objection, relevance as this fact is immaterial. For purposes of summary
21 judgment, a fact is "material" if it might affect the outcome of the suit
22

1 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
2 248 (1986). The amount of shifts assigned to Ross is irrelevant to
3 Kinnune's relief sought in his Motion for Partial Summary Judgment.

4 109. Not in dispute.

5 110. Not in dispute.

6 111. Disputed. Defendants agree that Matt McCord investigated Kinnune's
7 complaint and that he interviewed Kinnune, Hill, and Bordges. However,
8 he did not make a finding of "conflicting information." McCord found that
9 he "was unable to substantiate any of Kinnune's claims that he was treated
10 unfairly, harassed, suffered a hostile work environment, or had his
11 character undermined while he was away on military service." ECF No 39-
12 3 Ex 56, p. 6.

13 112. Not in dispute.

14 113. Partially disputed. Defendants do not dispute that any discussion of emails
15 between Bordges and Frost from July 2020 about Kinnune is not contained
16 in McCord's fact-finding. ECF No 39-3 Ex 59. However, the subject
17 matter of the emails Bordges sent to Frost in July 2020 is contained in
18 McCord's fact-finding report. Compare ECF No 39-3 Ex 59; Ex 37; Ex
19 38.

20 114. Objection, speculation. Kinnune references meetings about "the plan" for
21 Kinnune insinuating a negative connotation. However, there is no evidence
22

1 about what “the plan” was actually referring to as both people on the email,
2 Carlson and Kenney, have no recollection of what “the plan” was referring
3 to. See ¶ 77. Defendants do not dispute that any discussion of emails
4 between Bordges and Frost from July 2020 about Kinnune is not contained
5 in McCord’s fact-finding. ECF No 39-3 Ex 59.

6 115. Disputed. McCord’s fact-finding does not once mention having inaccurate
7 or incomplete information. ECF No 39-3 Ex 59.

8 116. Not in dispute.

9 117. Partially disputed. Kinnune sent two “updates” while on military leave
10 dated August 14, 2018, and November 13, 2018; and a holiday greeting on
11 January 1, 2019. ECF No 39-3 Ex 56-57.

12 118. Partially disputed. Frost did respond to Kinnune’s December 13, 2020,
13 email asking him to refrain from sending emails “to ESH employees from
14 [his] home computer” while on government service leave. ECF No 39-3
15 Ex 58, p 00502. Frost explained that having a EHS distribution list on his
16 computer may subject it to disclosure under the public records act, that
17 official ESH emails should only be used for work purposes, to not include
18 a religious connotation in his signature line. *Id.*

19 119. Not in dispute.

20 120. Not in dispute.

21 121. Not in dispute.

1 122. Not in dispute.

2 123. Not in dispute.

3 124. Objection, improper opinion as it invades the province of the jury. Lay
4 opinion witnesses “may not testify based on speculation, rely on hearsay
5 or interpret unambiguous, clear statements.” *Ward v. Crow Vote LLC*, 634
6 F. Supp. 3d 800, 810 (C.D. Cal. 2022). Here the testimony quoted is
7 interpreting documents shown to the witness by plaintiff’s counsel, not
8 relying on her personal knowledge of any fact.

9 125. Partially disputed. Defendants agree that Kinnune’s attorney sent ESH
10 CEO Kettner a letter dated September 23, 2021, that he was not going to
11 return to work. ECF No 39-3 Ex 64. Defendants dispute that ESH “has not
12 taken action to remedy this situation” as McCord conducted a fact-finding
13 into his allegations, but ESH determined that they were unsubstantiated.
14 ECF 39-3 Ex 59.

15 126. Objection, relevance as this fact is immaterial. For purposes of summary
16 judgment, a fact is “material” if it might affect the outcome of the suit
17 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
18 248 (1986). The amount of supervision an employee in a different position
19 received more than a year after Kinnune resigned from employment is
20 immaterial to his relief sought in his Motion for Partial Summary
21 Judgment.
22

1 DATED this 28 day of November, 2023.

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CERTIFICATE OF SERVICE

I certify that I electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 28 day of November, 2023, at Spokane, Washington.

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